

JUN 7 1967

JOHN F. DAVIS, CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1967

SHELL OIL COMPANY, *Petitioner*,

v.

PUBLIC SERVICE COMMISSION OF NEW YORK, *Respondent*.SKELLY OIL COMPANY, ET AL., *Petitioners*,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK AND  
LONG ISLAND LIGHTING COMPANY, *Respondents*.FEDERAL POWER COMMISSION, *Petitioner*,

v.

PUBLIC SERVICE COMMISSION OF THE  
STATE OF NEW YORK, ET AL.On Petitions for a Writ of Certiorari to the United States Court  
of Appeals for the District of Columbia Circuit**MEMORANDUM FOR RESPONDENTS**

KENT H. BROWN  
55 Elk Street  
Albany, New York 12225  
*Attorney for Public  
Service Commission of  
the State of New York*

EDWARD M. BARRETT  
BERTRAM D. MOLL  
250 Old Country Road  
Mineola, New York 11501  
*Attorneys for Long Island  
Lighting Company*

MORTON L. SIMONS  
902 Federal Bar Building  
Washington, D. C. 20006  
*Attorney for Respondents*

June 7, 1967

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1966

---

Nos. 1328, 1371, and 1372

---

**SHELL OIL COMPANY, *Petitioner,***

**v.**

**PUBLIC SERVICE COMMISSION OF NEW YORK, *Respondent.***

---

**SKELLY OIL COMPANY, ET AL., *Petitioners,***

**v.**

**PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK AND  
LONG ISLAND LIGHTING COMPANY, *Respondents.***

---

**FEDERAL POWER COMMISSION, *Petitioner,***

**v.**

**PUBLIC SERVICE COMMISSION OF THE  
STATE OF NEW YORK, ET AL.**

---

**On Petitions for a Writ of Certiorari to the United States Court  
of Appeals for the District of Columbia Circuit**

---

**MEMORANDUM FOR RESPONDENTS**

---

In two parallel but separate proceedings under Section 7 of the Natural Gas Act, the Federal Power Commission issued seventy-one certificates of public convenience and necessity authorizing sales of natural gas from fields in the Texas Gulf Coast (Texas Railroad

Commission District Nos. 2 and 3). In its decisions, which were issued simultaneously, the Commission (1) held that it was unnecessary for the applicants to present any evidence of need in support of their certificate applications, (2) held, over the dissent of two of its five members, that the in-line price previously determined for sales under contracts dated prior to September 28, 1960 increased by 1¢ per Mcf—to 16¢ per Mcf in District 2 and to 17¢ per Mcf in District 3—for sales to be made under contracts dated after September 28, 1960, and issued certificates conditioned at the 16¢ and 17¢ levels, and (3) deferred action on whether to require refunds of the amounts in excess of the in-line levels theretofore collected by the applicants under *ex parte* temporary certificates issued during the pendency of the hearings on permanent certification. *Hawkins & Hawkins*, Op. 475, 34 FPC 897 (1965); *Sinclair Oil & Gas Co.*, Op. 476, 34 FPC 930 (1965).

On appeal by the consumer interests,<sup>1</sup> the Court of Appeals for the District of Columbia Circuit, in an extensive and carefully reasoned opinion by Chief Judge Bazelon,<sup>2</sup> held that the Commission had erred

<sup>1</sup> In its petition for certiorari (pp. 3, 5, 7) the FPC refers to respondents as "distributors". Respondent Public Service Commission of the State of New York is not a distributor but is an agency of the State of New York charged with representing the consumer interest. Respondent Long Island Lighting Company, while a distributor, appears in these and similar proceedings as a representative of the consumers to whom it sells gas; this consumer role has been explicitly recognized not only by the courts, e.g., *Long Island Lighting Company v. F.P.C.*, 257 F. 2d 717 at 720 (3rd Cir. 1958), but by the signatories to the present FPC petition, see Memorandum for the Federal Power Commission, Nos. 1134 and 1135, this Term, p. 2.

<sup>2</sup> Senior Circuit Judge Wilbur K. Miller dissented without opinion.

both in issuing certificates in the absence of a showing of public need for the gas and in increasing the in-line price as of September 28, 1960. The court deemed it unnecessary to take action on the refund issue inasmuch as the Commission had, subsequent to submission of the case below but consistent with its representations on brief, entered an order requiring refunds in the District 3 proceeding and would, "we may assume," enter a refund order in the District 2 proceeding shortly. *Public Service Commission of the State of New York v. F.P.C.*, 373 F. 2d 816 (1967).

Petitions for certiorari have been filed by the Federal Power Commission and by six producers who intervened in support of the Commission in the court below. All three petitions challenge the D.C. Circuit's holding that the Commission erred in increasing the in-line price for contracts dated after September 28, 1960. In addition, Skelly Oil Company, et al., petitioners in No. 1371, challenge the D.C. Circuit's holding on need.

The decision of the court below on the in-line issue is, as the Commission states (FPC Pet. p. 6), "in acknowledged conflict with the rationale of the Court of Appeals for the Tenth Circuit in *Sunray DX Oil Co. v. Federal Power Commission*, 370 F. 2d 181". Petitions seeking a writ of certiorari to review the Tenth Circuit's decision have been filed by the instant respondents and other consumer interests, *Brooklyn Union Gas Co., et al. v. F.P.C., et al.*, No. 1135, this Term, and the Commission has acquiesced in the granting of that petition. We agree that the conflict between the circuits requires resolution by this Court and that the grant of certiorari here is therefore appropriate.

At the time the petitions were filed, it had been our intention to oppose the request of Skelly Oil Company to review the holding of the court below on the need issue, for the decision below was, in our view, eminently correct, it was not alleged to be in conflict with any decision of this Court or with any decision of a court of appeals for another circuit, and the Commission's deliberate choice *not* to seek certiorari on this issue (see FPC Pet. p. 6 n. 3) at least suggested that the decision below posed no administrative problems requiring the intervention of this Court. Subsequently, however, on May 24, 1967, the Court of Appeals for the Fifth Circuit (Judges Brown, Bell, and Dyer) held, in a related appeal, that the Commission need not make a finding that there is a public need for the gas before it issues a certificate of public convenience and necessity, *Continental Oil Co., et al. v. F.P.C.*, Fifth Cir. Nos. 23188 *et al.*, May 24, 1967.<sup>3</sup> We believe that the conflict between the D.C. and Fifth Circuits requires early clarification by this Court, and, accordingly, we acquiesce in the grant of certiorari on this issue also.

Though we are thus in substantive agreement with petitioners' requests for issuance of a writ of certiorari, we take exception to the Commission's procedural request (FPC Pet. p. 7) that action on the petitions in this case be deferred pending action on the petitions (in Nos. 1133-35) seeking review of the Tenth Circuit's *Sunray* decision. Wholly aside from the fact

---

<sup>3</sup> Respondents Public Service Commission of New York and Long Island Lighting Company were among the parties petitioner in the *Continental* proceeding, their petitions to review, originally filed in the D.C. Circuit, having been transferred to the Fifth Circuit pursuant to 28 U.S.C. § 2112(a).

that the Commission has neglected to offer any support for its assertion that such procedure is "the Court's normal practice", there is in the present case compelling reason to avoid such a "practice". In the first place, action on the *Sunray* petitions has been deferred, apparently at the Commission's request, so that the instant case is as far advanced as *Sunray*; this is not a situation where an issue presented by a recently filed petition might readily and logically await disposition of that issue in a case which is almost ready for decision. Second, and much more important, simultaneous consideration of *Sunray* and the instant case is essential to an accurate understanding of the factors which actually moved the Commission to elevate its price line for the period after September 1960.

If the Commission really wants a writ of certiorari to issue in this case, if it really wants this Court to review the opinion of Judge Bazelon and the Commission records on which it is based, we have no objection, for we are content to stand on that opinion, confident that it will be affirmed by this Court.

Indeed, assuming certiorari is granted both here and in *Sunray*, it is doubtful that the briefs to be filed in this Court would add anything to the extensive opinions handed down, on the one hand, by the Tenth Circuit in the *Sunray* case and, on the other, by the D.C. Circuit in the instant case and in the earlier *Skelly* case.<sup>4</sup> Accordingly, we respectfully suggest that an appropriate disposition of this case would be grant of

---

<sup>4</sup> *Public Service Commission of New York v. F.P.C.*, 329 F. 2d 242 (D.C. Cir. 1964), cert. denied sub nom. *Prado Oil & Gas Co. v. F.P.C.*, 377 U.S. 963.

certiorari and summary affirmance, coupled with grant of certiorari and summary reversal in *Sunray*.

Respectfully submitted,

MORTON L. SIMONS  
902 Federal Bar Building  
Washington, D. C. 20006  
*Attorney for Respondents*

✓ KENT H. BROWN  
55 Elk Street  
Albany, New York 12225  
*Attorney for Public Service  
Commission of the State of  
New York*

EDWARD M. BARRETT  
BERTRAM D. MOLL  
250 Old Country Road  
Mineola, New York 11501  
*Attorneys for Long Island  
Lighting Company*

June 7, 1967